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In The

Supreme Court of the United States

October Term, 1998

EL PASO NATURAL GAS COMPANY, A DELAWARE CORPORATION; CYPRUS FOOTE MINERAL COMPANY, A PENNSYLVANIA CORPORATION; AND CYPRUS AMAX MINERALS COMPANY, A DELAWARE CORPORATION,

Petitioners,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATES OF SOUTH DAKOTA, CALIFORNIA, MICHIGAN, MONTANA, NEVADA, NEW YORK, UTAH AND WYOMING AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTRODUCTION

The states of South Dakota, California, Michigan, Montana, Nevada, New York, Utah and Wyoming, through their respective Attorneys General, respectfully submit a brief amicus curiae pursuant to Supreme Court Rule 37.4 in support of Petitioners.

INTEREST OF AMICI STATES

This case raises the issue of when a person or entity may be forced to exhaust tribal remedies before proceeding to federal court. The issue is of substantial concern to the states. First, states and citizens of states have found themselves the targets of repeated suits in tribal courts.[1] Second, states and citizens of the states are faced with repeated attempts by the tribe to exercise jurisdiction over nonmembers of the tribe and divest the states of their historic jurisdiction. *See, e.g., South Dakota v. Yankton*

[1] *See* Wrend and Smith, *American Indian Law Deskbook* 149 n.117 (2d ed. 1998) (listing cases brought in tribal court against citizens, state employees, and others). *See also Montana v. Gilham*, 133 F.3d 1133 (9th Cir. 1998) (state immune from tort action in tribal court); *Archambault v. Montana*, No. CV-98-51 (Ft. Belknap Tribal Court) (action seeking prospective and retroactive relief against state child support agency and personnel); *Covers Up v. Montana*, Nos. 98-112 and 98-118 (Crow Tribal Court) (actions seeking prospective relief against state child support agency and personnel); *Crooked Arm v. Walters*, No. 96-359 (Crow Tribal Court) (action seeking damages for off-reservation activity of Montana state child protective services personnel); *After Buffalo v. State*, No. ___ (Blackfeet Tribal Court) (pending action alleging misconduct of Montana state child welfare employee).

Sioux Tribe, 118 S.Ct. 789 (1998) (tribal attempt to divest state of jurisdiction over proposed solid waste facility on fee land); *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 64 (1997) (tribal attempt to divest state of jurisdiction over hunting and fishing on Corps of Engineers' land and fee land); *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989) (tribal attempt to divest local government of zoning jurisdiction). Subjecting such disputes to initial tribal court jurisdiction would be costly and would not materially advance the public interest.

Moreover, it threatens to unbalance the playing field. A commentator has presciently noted that "One may speculate on the significance of this power by imagining how the civil rights controversies of the 1960s and 1970s would have developed if the cases were required to be litigated initially in state courts." Slade, *Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. Rev. 519 n.1 (1995).

SUMMARY OF ARGUMENT

Federal courts have a "virtually flagging obligation" to exercise jurisdiction in cases which have legally come before them. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). Nonetheless, this Court has developed exceptions to that general principle with regard to disputes in state courts and, drawing on

the same principles, among others, has developed exceptions to this general rule when the dispute concerns a case which has been, or might be, filed in tribal court.

Thus, in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), this Court found that a federal case challenging the jurisdiction of the tribal court should be held in abeyance or dismissed pending further proceedings in the tribal court. The Court noted, essentially, that the question of whether the tribe could legitimately exercise civil subject matter jurisdiction in the case had not been established, so exhaustion would be required; if it had been established that no tribal jurisdiction existed, exhaustion would have been "automatically foreclosed." *Id.* at 855.

The Court also noted, consistent with prior decisions in the state-federal context, that it did not suggest that exhaustion would be required where the assertion of tribal jurisdiction was motivated by a desire to harass, was conducted in bad faith, when the action was "patently violative of express jurisdictional prohibitions" or when exhaustion would be futile because there was no opportunity to challenge the Court's jurisdiction. *Id.* at 856 n.21.

Strate v. A-1 Contractors, 520 U.S. 438 (1997), made it clear that the term "express . . . prohibitions" did not require a specific statement by Congress precluding tribal jurisdiction but rather referred to any instance in which the tribe was precluded, as a matter of federal common or statutory law, from exercising jurisdiction.

Federal statutory law does, in fact, prohibit the tribes from exercising jurisdiction over "nuclear incidents."

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960), establishes that laws of general application apply to Indians and Indian tribes, and, of course, the Price-Anderson Act is such a law. The Price-Anderson Act, in turn, which comprehensively regulates the "nuclear incidents" at issue here, leaves no room for the existence of a tribal cause of action. Thus, the tribal court was precluded, as a matter of law, from hearing a case arising from a tribal cause of action.

Nor could the tribal court hear a case arising under the Price-Anderson Act itself. First, Respondents here failed to appeal the injunction of the district court which prohibited the tribal court from hearing a case arising under the Price-Anderson Act. The court of appeals simply lacked jurisdiction to reverse an unappealed decision of the district court.

Even if the issue is reached, the decision is the same. Tribal courts may exercise only their inherent authority and have never had, nor were they granted by the Constitution, any authority to enforce federal law. Thus, they lack jurisdiction to enforce the provisions of the Price-Anderson Act in any event.

ARGUMENT

A FEDERAL COURT SHOULD NOT REQUIRE EXHAUSTION OF TRIBAL COURT REMEDIES, WHERE, AS HERE, THE GRANT OF RELIEF BY THE TRIBAL COURT IS PRECLUDED BY FEDERAL LAW.

This case presents the issue of whether a federal court should stay its jurisdiction so that a tribal court

may determine whether to impose liability as a result of a "nuclear incident" as defined by the Price-Anderson Act, as amended. *See* 42 U.S.C. § 2014(q). Because federal law precludes the tribal court from granting relief in any instance, it was improper for the federal court below to abstain from exercising its authority under 28 U.S.C. § 1331 and to fail to enjoin the tribal court from asserting jurisdiction over the alleged "nuclear incident."

A. Abstention by Federal Courts So That Claims May Be Exhausted in Other Forums Is a Narrow Exception to the Virtually Unflagging Duty of Federal Courts to Exercise Their Jurisdiction.

This Court has found that there exists a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation District*, 424 U.S. at 817. The Court explained that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule", *id.* at 813, and referred to abstention as an " 'extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.' " *Id.* (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959)). As explained in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16 (1983), abstention was deemed appropriate in *Colorado River* so as to promote a *federal* purpose – the

> 'clear federal policy . . . [of] avoidance of piecemeal adjudication of water rights in a river system' . . . as evidenced in the McCarran Amendment. We recognized that the Amendment represents Congress' judgment that the

> field of water rights is one peculiarly appropriate for comprehensive treatment in the forums having the greatest experience and expertise, assisted by state administrative officers acting under the state courts.

It is clear that the Petitioners' action properly arises under federal law, 28 U.S.C. § 1331. The district court thus had an obligation to exercise its jurisdiction unless an exception to the virtually flagging obligation of the federal court to exercise its jurisdiction existed, and the Ninth Circuit was wrong in finding otherwise.

B. Exhaustion in Tribal Courts Is Not Required With Respect to Issues Over Which the Tribe Lacks Authority or Where Exhaustion Would Serve No Purpose Other Than Delay.

This Court has developed a tribal exhaustion doctrine with origins both in Indian law and in general abstention doctrine (i.e., that part of the doctrine parallel to the abstention doctrine regarding states). Thus, for example, *National Farmers Union*, 471 U.S. at 856 n.21, quoted *Judice v. Vale*, 430 U.S. 327, 338 (1977), an abstention case, at a critical juncture, and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987), invoked the principles of *Colorado River*, in stating that exhaustion would be required only "as a matter of comity, not as a jurisdictional prerequisite."

The essential tribal court exhaustion rule is that, unless strong federal policies indicate otherwise, *see Iowa Mutual Insurance Co.*, 480 U.S. at 16 n.8, or unless it can be said that tribal jurisdiction over non-Indians "in a case of this kind" is precluded, *see National Farmers Union*, 471

U.S. at 855, exhaustion may be required; the exceptions to such a requirement include that the exercise of tribal jurisdiction is motivated by bad faith, the action is "patently violative of express jurisdictional prohibitions," or when exhaustion would be futile because of the lack of a subsequent opportunity to challenge the court's jurisdiction. *Id.* at 856 n.21. The issue now before this Court is whether the exercise of tribal jurisdiction in this case is precluded because it is "patently violative of express jurisdictional prohibitions." *Id.*

Strate v. A-1 Contractors answers that question. *Strate*, 520 U.S. at 459, found that an Indian tribe had no legislative or regulatory jurisdiction over a "commonplace state highway accident" on a North Dakota highway through a reservation. Accordingly, the tribe lacked "adjudicative jurisdiction." *Id.* at 453. *Strate* pointedly added that when similar cases arose, they were to be adjudicated in federal, and not tribal court, and that the exhaustion requirements had to give way. *Strate*, 520 U.S. at 459 n.14 (citations omitted) (emphasis added) found:

> When, as in this case, it is plain that no federal grant provides for federal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. Therefore, when tribal-court jurisdiction over an action *such as this one* is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.

Strate makes it clear, therefore, that the term "express jurisdictional prohibition" is to be construed to include any instance in which the tribal court is prevented, as a matter of federal common or federal statutory law, from exercising jurisdiction.[2] *Strate* pointedly did *not* require a specific statement by Congress which preempted tribal jurisdiction. *See also* PA 23a (Kleinfield, J., dissenting).

Strate is thus consistent with *National Farmers Union*, 471 U.S. at 853 (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204 (1978)), which noted that " 'Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians,' " but nonetheless found that the tribe lacked criminal jurisdiction to try and punish non-Indians. *National Farmers Union*, 471 U.S. at 854,

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[2] The *Strate* footnote also clarifies that when an incident arises on "land covered by *Montana*'s main rule" (not argued to be the case here) and when "no federal grant provides for federal governance of nonmembers' conduct," federal courts will have jurisdiction to determine any dispute over the existence of tribal authority. *Strate*, 520 U.S. at 459 n.14. The literal language of the footnote leaves no other alternative. Moreover, footnote 14 indicates, and the court of appeals seems to acknowledge, *see* PA 7a, 25a, that "while the presumptive absence of tribal jurisdiction can be rebutted by application of one or both of the exceptions identified in *Montana*, *Strate* indicates this determination should be made by the federal court in the context of determining the nonmember's challenge to tribal court jurisdiction." Wrend and Smith, *American Indian Law Deskbook* 138 (2d ed. 1998). Recognizing the authority of the federal courts in this respect makes practical sense, since the principal expertise of tribal courts lies in applying *tribal* law. *Id.* *See also Moses H. Cone*, 460 U.S. at 16 (deference to state court when it had "greatest experience and expertise").

concluded that requiring exhaustion with regard to a tribal attempt to exercise such criminal jurisdiction "would be completely foreclosed. . . .." There is, in short, no necessity for any special language to preclude the necessity for exhaustion, as both *National Farmers Union* and *Strate* confirm.

C. The Price-Anderson Act Deprives the Tribes of Authority Over "Nuclear Incidents"; Exhaustion in Tribal Courts In "Nuclear Incident" Cases Should, Therefore, Not Be Required.

1. The Price-Anderson Act Applies to Indian Tribes.

In *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), this Court stated, "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." The Court also emphasized that view later in the opinion, stating that the "general Acts of Congress apply to Indians as well as to others in the absence of a clear expression to the contrary." *Id.* at 120. That principle should control here. The Price-Anderson Act is an act of general application, and under the language of *Tuscarora* applies to Indian litigants and to tribal courts.

Nor can it be argued that *Tuscarora* does not apply because a specific treaty right of a tribal member has been invaded, as was the issue in *United States v. Dion*, 476 U.S. 734 (1986) (Congress found to abrogate specific treaty right after clear showing that the right had been considered by Congress). Accordingly, this case is in line with

those in which the courts have imposed laws of general applicability on tribes and members of tribes in the face of a claim of a generalized treaty right to be free from federal control. *See Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 (7th Cir. 1989) (quoting F. Cohen, *Handbook of Federal Indian Law* 399 (1982 ed.): " 'There can be little doubt that tribes are subject to [the withholding statute's] requirements as employers, and Indians are covered as employers or employees. . . . Tribes and Indians have in fact complied with this law, and there seems no controversy over it' "); *U.S. Department of Labor v. Occupational Safety & Health Review Commission*, 935 F.2d 182, 186 (9th Cir. 1991) (right of exclusion arising from general treaty language did not preclude the application of the Occupational Safety and Health Administration Act to a sawmill owned and operated by a tribe); *United States v. Baker*, 63 F.3d 1478, 1485 (9th Cir. 1995) (Contraband Cigarette Trafficking Act applied to Indians on reservations despite treaty language).

2. The Price-Anderson Act Precludes the Exercise of Tribal Jurisdiction Over a Nuclear Incident and a Requirement of Exhaustion in Such a Case Is Thus Erroneous.

a. The Tribal Court Lacked Jurisdiction to Consider a Claim Under Tribal Law for Damages Arising From a "Nuclear Incident."

The district court specifically allowed the tribal court to consider whether it had jurisdiction to pursue a claim arising from a "nuclear incident" under *tribal law*, and the court of appeals affirmed. This determination, however, was erroneous.

First, the Price-Anderson Act itself does not allow the existence of tribal cause of action arising from a "nuclear incident." The 1988 Amendments to the Act provide, inter alia, that a "nuclear incident" is any occurrence causing injury or damage "resulting from the radioactive, toxic, explosive, or other hazardous properties" of nuclear materials, 42 U.S.C. § 2014(q), and that "public liability" means "any legal liability arising out of or resulting from a nuclear incident" (with certain exceptions not relevant here). *Id.* at 2014(w). The Amendment in turn defines a "public liability action" to mean "any suit asserting public liability," *id.* at 2014(hh), and provides that a "public liability action shall be deemed to be an action arising under section 2210 of this title." *Id.*

As the court of appeals found, the 1988 Amendments to Price-Anderson expanded its reach to include all " 'public liability actions.' " PA 11a. The court of appeals, at *id.*, also appropriately quoted the language of S. Rep. No. 218, 100th Cong., 1st Sess. 2, 13 (1987), that " '[a]ny suit asserting public liability shall be deemed to be an action under the Price-Anderson Act.' " Likewise, in the case entitled *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 854 (3d Cir. 1991), the Court of Appeals for the Third Circuit stated that "A claim growing out of any nuclear incident is compensable under the terms of the [1988] Amendments Act or *it is not compensable at all.*"

Thus, there is no room for a tribal cause of action in the federal arrangement. This point is emphasized by other language of the Act. 42 U.S.C. § 2014(hh) states that:

> A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such

> action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

The Act makes *state* substantive law generally applicable in a Price-Anderson Act case. It would be incongruous to allow a *tribal* cause of action to proceed in the face of this language.

Moreover, the Act provides that a "nuclear incident" action filed in *state* court can be removed to federal court. 42 U.S.C. § 2210(n)(2).[3] Again, it would be unreasonable to argue that Congress intended that tribal causes of action (which are *not* removable to federal court) survive, when state causes of action arising from "nuclear incidents" survive but *are* easily removable to federal court. This is especially so considering the aim of Congress to "effect uniformity, equity and efficiency in the disposition" of nuclear-related claims. *In re TMI Litigation Cases II*, 940 F.2d at 857. *Contrast, Moses H. Cone*, 460 U.S. at 16 (abstention in water adjudication *promoted* Congressional policy).

Because Price-Anderson is an Act of general applicability and is applicable to tribes and Indian litigants, and because the Act precludes any cause of action other than those under the Price-Anderson Act, no tribal cause of action could survive. Under *Strate*, 520 U.S. at 459 n.14, exhaustion cannot be required where the tribe lacks regulatory (and thus necessarily adjudicative) authority in actions "such as this one." Thus, the court of appeals

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[3] This provision, it is clear, allows a *state* court to hear a Price-Anderson Act case, as long as it is not removed.

erred in imposing an exhaustion requirement with regard to the tribal cause of action.

b. The Tribal Court Had No Jurisdiction to Hear an Action Arising Under the Price-Anderson Act.

The district court enjoined the tribal plaintiffs "from pursuing a Price-Anderson Act complaint in tribal court." PA 28a. *See also* PA 30a, 32a-33a. The plaintiffs did not appeal the injunction. The court of appeals, however, announced that it would, based upon "comity" concerns, *id.* at 9a, *sua sponte* examine whether Price-Anderson constitutes an express prohibition of tribal court jurisdiction.

The court of appeals lacked jurisdiction to hear the appeal. Justice Brandeis explained in *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924), that

> a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree of the view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks to correct is an error or to supplement the decree with respect to a matter not dealt with below.

20 James Wm. Moore, et al., *Moore's Federal Practice* § 304.11[3][b] (3d ed. 1998) summarizes the rule as follows: "if the matters an appellee raises constitute a challenge to the order or judgment, a cross-appeal must be taken." This is distinguished from the situation in which an appellee without cross-appealing simply supports a

decree by utilizing matter in the record, even if the argument involves an attack on the reasoning of the lower court. *American Railway*, 265 U.S. at 435.

Clearly, the failure to take an appeal with regard to the injunction restraining the tribal plaintiffs from proceeding with a Price-Anderson case in tribal court required a separate cross-appeal under established law. Respondents offer no real argument to the contrary. None of the cases cited by Respondents, in fact, would require vacation of an unappealed final order of a district court. Moreover, principles of comity and federalism do not justify the exercise of jurisdiction here, and there is no case authority for formulating a new principle of appellate jurisdiction for the benefit of the Respondents here. Surely no principle of Indian law excuses the Respondents from adherence to the rules of civil procedure. *See generally United States v. Mottaz*, 476 U.S. 834, 851 (1986) (statute of limitations in Quiet Title Act applies to Indians); *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 592 (9th Cir. 1990), *cert. denied*, 498 U.S. 824 (1990). Since the filing of a notice of appeal within time limits is " 'mandatory and jurisdictional,' " *Browder v. Director, Department of Corrections*, 434 U.S. 257, 264 (1978), the appeal was improperly heard by the court of appeals.

If this Court does reach the issue of whether the tribal court could properly entertain a case under the Price-Anderson Act, the answer is that it may not. The reason is plain: tribal courts have inherent authority only to apply tribal law.

First, there is no historical, doctrinal, or other basis from which to imply a pre-constitutional power of the

tribes to enforce federal law, which, after all, did not even exist prior to the Constitution. Next, no argument can be made that the Constitution somehow vested in the tribes an inherent power to enforce federal law. The Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, grants *Congress* broad powers over Indian affairs, *see, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973), and there is no basis to read the clause as a grant of federal power *to the tribes*. *See also Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Moreover, it is well established that the inherent authority of the tribes has been *limited*, not expanded, and that tribes may today exercise only those inherent powers that are not inconsistent with their "dependent status." *See, e.g., Montana v. United States*, 450 U.S. 544, 564 (1981). *See also Strate*, 520 U.S. at 457-459. It is surely "inconsistent" with the "dependent status" of Indian tribes to allow them, based on their inherent powers, to enforce provisions of law enacted by the federal government, the entity which exercises plenary power over them.

We likewise do not understand any argument to be made that Congress has in fact legitimately delegated power to the tribes to enforce federal law, in general, or to enforce federal laws dealing with "nuclear incidents" in particular. *See generally Duro v. Reina*, 495 U.S. 676, 693-94 (1990).[4] In short, we do not perceive any doctrinal

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[4] From another perspective, it is submitted that because, as established above, the federal government has preempted all aspects of nuclear safety under the Price-Anderson Act, tribes may not regulate nuclear safety. Because *Strate*, 520 U.S. at 453,

basis on which to argue that the tribes have ever had or now retain the inherent power to enforce federal law, or any basis on which to argue that such power has been delegated here.

Finally, because the tribes lack authority to enforce federal law, *Strate* precluded the court of appeals from requiring exhaustion of any tribal court remedies in this regard, even if the issue had been properly before it.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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holds, at least in the case of nonmembers, that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," tribes must also lack the jurisdiction to adjudicate the present dispute under the Price-Anderson Act.